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Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

JAMES JOSEPH DARNELL,
Petitioner,

VS.

VINCENT SWINNEY, WASHOE COUNTY SHERIFF,
and
BRIAN W. MCKAY, NEVADA ATTORNEY GENERAL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

This Petition for a Writ of Certiorari presents the following federal questions for review by this Court:

A. DOES THE DUE PROCESS CLAUSE PERMIT A STATE SUPREME COURT TO RETROACTIVELY CRIMINALIZE CONDUCT WHICH WAS NON-CRIMINAL WHEN IT OCCURRED BY APPLYING ITS JUDICIAL MODIFICATIONS OF THE ELEMENTS OF THE OFFENSE TO THE CASE IN WHICH SUCH MODIFICATIONS ARE FIRST ADOPTED.

B. ARE JURY INSTRUCTIONS WHICH DO NOT DEFINE THE ELEMENTS OF THE OFFENSE IN TERMS OF THE FACTS TO BE PROVEN SO FUNDAMENTALLY UNFAIR AS TO DENY THE DEFENDANT DUE PROCESS OF LAW?

C. IS A STATE STATUTE WHICH MANDATES DEFINING "REASONABLE DOUBT" AS A "SUBSTANTIAL DOUBT" CONTRARY TO THE BURDEN OF PROOF REQUIRED BY DUE PROCESS?

D. ARE PROSECUTION INSTRUCTIONS TO LAW ENFORCEMENT WITNESSES TO REFUSE TO BE INTERVIEWED BY DEFENSE COUNSEL AN IMPERMISSIBLE INTERFERENCE WITH THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

E. DOES THE TRIAL OF UNCHARGED AND UNPROVEN ALLEGED PRIOR CRIMINAL CONDUCT WITHIN THE TRIAL OF THE CHARGED OFFENSE, TO PROVE INTENT AS TO THE CHARGED OFFENSE, RENDER THE TRIAL ON THE CHARGED OFFENSE FUNDAMENTALLY UNFAIR?

PARTIES TO THE PROCEEDING

All parties to this proceeding are identified in the caption of the proceeding. The Respondents are officials sued in their official capacities.

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OPINIONS OF LOWER COURTS

The opinions of the lower Courts which are pertinent to the issues raised in this Petition for a Writ of Certiorari are the following:

1. Nevada Supreme Court Decision on the Petitioner's direct appeal from his conviction, which is the opinion which gives rise to the first question presented for review above, is *Darnell v. State,* 92 Nev. 680, 559 P.2d 624 (1976), and is reproduced in its entirety in Appendix B.

2. Nevada Supreme Court Decision on Petitioner's post-conviction appeal (required to exhaust state remedies pursuant to intervening orders of the United States District Court for the District of Nevada and United States Court of Appeals for the Ninth Circuit) is *Darnell v. State,* 98 Nev. 518, 654 P.2d 1009 (1982), and is reproduced in its entirety in Appendix C.

3. The Memorandum Decision and Order of the United States District Court for the District of Nevada, in Darnell v. Swinney, et al, No. CV-R-83-72 ECR, denying Petitioner's Petition for a Writ of Habeas Corpus is unreported, and is reproduced in its entirety in Appendix D.

4. The Opinion of the United States Court of Appeals for the Ninth Circuit affirming the denial of a writ of habeas corpus has been released for publication but is not yet reported; it is Case No. 86-2481, and is reproduced in its entirety in Appendix E.

JURISDICTIONAL STATEMENT

This Petition is to review the decision of the United States Court of Appeals for the Ninth Circuit, filed and entered July 27, 1987.

No motion was made for rehearing, and no extension of time to file this petition was requested. The issuance of the mandate has been stayed by order of the United States Court of Appeals for the Ninth Circuit. (Appendix A)

This is a civil action for a writ of habeas corpus arising from a state court criminal action, and filed pursuant to Title 28 U.S.C. § 2254 after exhaustion of state remedies on all claims. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1) which authorizes a petition writ of certiorari to review the decision of a Court of Appeals.

CONSTITUTION AND LAWS INVOLVED

The following provisions of the United States Constitution and of applicable laws of the State of Nevada involved herein:

UNITED STATES CONSTITUTION, ARTICLE I, § 10, Para. 1:

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of marque or Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainer, ex

post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

UNITED STATES CONSTITUTION, SIXTH AMENDMENT:

"Rights of accused in criminal prosecutions. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and have the Assistance of Counsel for his defence."

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, Section 1:

"Section 1. Citizenship; privileges and immunities; due process; equal protection.

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEVADA REVISED STATUTES (N.R.S.) 1.030:

Application of common law in courts.

"The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the constitution and laws of this state, shall be the rule of decision in all the courts of this state."

NEVADA REVISED STATUTES 175.211:

"1. A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weight affairs of life. If the

minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual and substantial, not mere possibility or speculation.

"2. No other definition of reasonable doubt shall be given by the court to juries in criminal actions in this state."

NEVADA REVISED STATUTES (N.R.S.) 193.050:

"1. No conduct constitutes a crime unless prohibited by some statute of this state or by some ordinance or like enactment of a political subdivision of this state.

"2. An act which is declared to be unlawful by any statute, ordinance or like enactment is prohibited within the meaning of this section and of NRS 193.170.

"3. The provisions of the common law relating to the definition of public offenses apply to any public offense which is not prohibited but is not defined, or which is so prohibited but is incompletely defined.

"4. This section does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decree."

NEVADA REVISED STATUTES (N.R.S.) 205.275(1):

"1. Every person who, for his own gain, or prevent the owner from again possessing his property, buys, receives, possesses or withholds stolen goods, or anything the stealing of which is declared to be larceny, or property obtained by robbery, burglary or embezzlement:

"(a) Knowing that the goods or property were so obtained; or

"(b) Under such circumstances as should have caused a reasonable man to know that such goods or property were so obtained,

shall be punished by imprisonment in the state prison for a term not less than 1 year nor more than 10 years, or by a fine of not more than $10,000, or by both fine and imprisonment. Every such person may be tried, convicted and punished as well as after the trial of the principal."

NEVADA REVISED STATUTES (N.R.S.) 208.070 (1969) (amended in 1981 and recompiled as N.R.S. 193.330 in 1986)

"An act done with intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime."

STATEMENT OF THE CASE

On October 9, 1974, the Petitioner, A Reno police officer, was contacted by an acquaintance, James Latour, who telephoned him while he was on a dinner break, and requested a meeting at a local restaurant because he had some things for Darnell. Darnell met Latour as requested, and Latour advised Darnell that he, Latour, and some friends had been arrested in Sparks, a city adjacent to Reno, and that he was trying to raise bail money for his friends. He offered to sell Darnell three firearms which Darnell agreed to purchase if he could pay for them the following evening. Darnell and Latour agreed on a time and place to meet the following evening; Darnell took the firearms into his possession and proceeded in his patrol vehicle directly to the Reno police station, where he initially placed the firearms in the private vehicle of another officer while he took his gear into the station. He thereafter returned to the motor pool, obtained the key to the private vehicle from the officer who owned it, who was in the motor pool as he returned at change of shift, and took the firearms into the station to Detective Westlake in the Detective Bureau. While Darnell was in the police station, Latour called the station and Darnell received the call. Within minutes, Darnell was arrested and charged with receiving stolen property.

Darnell testified that when he was confronted with the Latour offer, he was in a one-on-one situation in which he would be unable to prove Latour's statements. He determined that he should persuade Latour he intended to purchase the firearms in

order to obtain possession of them, after which he would enlist the assistance of the Detective Bureau to determine if the guns were in fact stolen, and to surveill the payoff the following evening. Unbeknownst to Darnell at the time, however, was the fact that the entire transaction between himself and Latour was set up by officers of the Reno and Sparks Police Department to "test" Darnell as a result of Latour's claim, at the time he was arrested on several counts of burglary, that he had sold a stolen K-38 gun to Darnell a year previously. The guns offered to Darnell had been removed by police officers from the Reno police evidence locker earlier in the day, and given to Latour for purposes of the "test". The entire meeting between Darnell and Latour was surveilled and tape recorded, and Darnell was followed to the police station after he and Latour parted company.

The prosecution contended that Darnell intended to keep the firearms, reporting the incident and turning the guns in to Detective Westlake only because he was tipped off by the Latour phone call to the station that something was amiss. Darnell claimed that he reported the incident and turned in the guns before the Latour call came into the Patrol Office, where he was filling out a leave form. The critical issue was the sequence of Darnell's activities inside the police station, but no person inside the station was aware of the "test", and therefore there was no witness, other than the Petitioner, as to whether he reported the incident to the Detective Bureau before the Latour call was received.

Prior to the trial in the case, defense counsel attempted to interview witnesses, who, because of the nature of the case, were primarily law enforcement personnel in Sparks and Reno. The District Attorney's office issued a written memorandum advising law enforcement personnel that the purpose of interviews by defense counsel was to distort and confuse, and that they should decline such interviews, which memorandum was posted with a directive from the command officer of the department to comply. Defense counsel complained of this interference with their right to interview witnesses at a pre-trial hearing, but no relief was afforded. At trial, in cross-examining some of the witnesses, defense counsel brought out the refusal of some of the witnesses to be interviewed. The prosecution was then permitted, over

objection of defense counsel, to introduce the memorandum and directive and have the same read to the jury as justification for the officers' refusal to be interviewed.

Defense counsel also filed a pre-trial writ of habeas corpus challenging the validity of the charge of possession of stolen property on the grounds that the property (firearms) was not stolen, having been recovered by the police prior to the transaction. This petition was granted, and the prosecution proceeded on a charge of attempted possession of stolen property. This charge was also challenged by a pre-trial writ of habeas corpus, but the Trial Court ruled that the attempt charge could stand under the reasoning of California (not Nevada) law that the subjective intend was the critical issue, and if the defendant believed the guns were stolen, that was sufficient for an attempt even if they were not in fact stolen. The Defendant had also been charged with receipt of stolen property arising from the sale, a year previously, of a K-38 revolver to him by Latour. This charge was severed for a separate trial on Defendant's motion, and reference to this incident was precluded by the Court's granting of a motion in limine at the outset of the trial.

Mid-way through the trial, the Court reversed its ruling on the motion in limine, and permitted reference to the K-38 incident. From that point on, over the objection of defense counsel, the evidence in the trial was directed to proof of the K-38 incident, and whether or not the defendant knew that the K-38 revolver was stolen at the time he purchased it from Latour. The Court instructed the jury that this evidence could only be considered on the issue of the defendant's intent in purchasing the three firearms on October 9, 1974.

Because the Court had ruled in its order denying the pre-trial petition for habeas corpus that the elements of the offense as defined under the California law would be followed, the defendant requested instructions including such elements, specifically, the subjective belief and specific intent of the defendant, which were refused. The Defendant objected to the Court's instruction on the required elements of the offense, which read as follows:

"Nevada Revised Statutes Section 208.070, insofar as applicable to this case provides: That an act done with intent to commit a crime, intending (sic) but failing to accomplish it, is an attempt to commit that crime.

"Property which had at one time been stolen, but which has been recovered by the police, loses its character as stolen property upon such recovery. Once such property is in the custody of the police, it is no longer stolen property. Since the property involved herein had been recovered, the offense of receiving stolen property could not be completed, and only an attempt could be charged.

"Unless you find from your consideration of all of the evidence that each of such facts has been proven beyond a reasonable doubt, the State has not sustained its burden of proof and you must acquit the defendant."

The Defendant was convicted of the charge of attempted possession of the three firearms by the verdict of the jury, and was sentenced to imprisonment in the state penitentiary for four (4) years, which sentence was suspended, and the defendant was placed on probation for four (4) years with a condition that the first six (6) months of such term be served in the Washoe County Jail. The defendant appealed to the Nevada Supreme Court, and the sentence was stayed pending appeal and the defendant was released on bail.

On the direct appeal, the defendant contended, *inter alia,* that the law of the State of Nevada, under its attempt statute and the common law, was that an attempt to do what would not be a crime if accomplished was not a criminal attempt. The Nevada Supreme Court affirmed the conviction, holding that while the common law and a Nevada Supreme Court decision, *State v. Lung,* 21 Nev. 209, 28 Pac. 235 (1891) supported defendant's position, it believed the "better rule" to be that of the Model Penal Code, and overruled *State v. Lung, supra,* and "its progeny". It stated that the "rule we hereby adopt" is that if the defendant specifically intended to commit the crime, and if the act would have tended to the commission of the crime if the facts

had been as the defendant "subjectively believed" them to be, the act would be an attempt.

The defendant petitioned for rehearing on several grounds, including the contention that application of the newly-adopted rule to the facts of defendant's case would have an impermissible *ex post facto* effect of criminalizing conduct which was not criminal at the time it occurred in 1974. This petition was denied without comment by the Nevada Supreme Court.

The defendant then petitioned in the United States District Court for the District of Nevada for habeas corpus relief. The matter was referred to the United States Magistrate, who issued a written report that the conviction violated due process of law because of the impermissible *ex post facto* effect of the Supreme Court's decision on petitioner's direct appeal. The United States District Judge rejected the recommendation that habeas corpus relief be granted on the grounds that state remedies had not been exhausted, since the petition for rehearing was not granted, and the Nevada Supreme Court therefore did not address the merits of the *ex post facto* claim. The United States District Judge then caused an original petition for a writ of habeas corpus to be filed by the federal Court in the Nevada Supreme Court to permit the Nevada Supreme Court to address the issue. Without first ruling on whether the petition would be accepted and without affording the parties an opportunity to present briefs on the issue, the Nevada Supreme Court issued an order denying the petition for a writ of habeas corpus on the grounds that the language in *State v. Lung, supra,* which was overruled on defendant's appeal was mere *obiter dicta,* and thus the decision on defendant's appeal did not change the law.

Upon receipt of that order, the United States District Judge remanded the matter back to the United States Magistrate for determination of the other issues raised on the habeas corpus petition (including all those raised herein), and the Magistrate filed a report finding such issues not subject to remedy by habeas corpus. The defendant objected to such report, and pointed out to the United States District Court that if the prior case law in Nevada was considered to be only *obiter dicta,* the decision nonetheless changed the law of Nevada, since under Nevada law

(N.R.S. 1.030 and N.R.s. 193.050) the common law would be incorporated into the definition of any offense proscribed by Nevada statute, and the language of *State v. Lung, supra,* even if *obiter dicta,* was a statement of the common law. The United States District Judge determined that this issue had not been presented to the Nevada Supreme Court and denied habeas corpus relief on the grounds that state remedies had not been exhausted. This order was appealed to the United States Court of Appeals for the Ninth Circuit, which, in an unpublished memorandum order, agreed with the United States District Court and directed the defendant to pursue state remedies through its post-conviction procedures.

Defendant then petitioned the state trial court for post-conviction relief, which was denied. On appeal from this denial, the Nevada Supreme Court ruled, in a three to two decision, that it would not consider the issues because defendant could have raised them when the federal court filed the first petition for habeas corpus in the Supreme Court (notwithstanding that no opportunity for briefing was given the parties). (Appendix C)

The defendant again filed a petition for a writ of habeas corpus in the United States District Court for the District of Reno. The matter was referred to the Magistrate, who recommended that the petition be denied. The United States District Court upheld such recommendation over the defendant's objections. (Appendix D)

The defendant appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed the denial of habeas corpus relief, holding that (1) the *ex post facto* effect of the change in the definition of the offense on Petitioner's direct appeal was not a constitutional violation because the Petitioner was not "misled"; (2) the failure to instruct on the elements of the offense was not a constitutional violation since the elements on which the court failed to properly instruct were not in dispute; (3) the statutory instruction on the burden of proof, equating "reasonable doubt" with "substantial doubt" was not an error justifying habeas corpus relief; (4) the interference with defense counsel's ability to interview witnesses was not sufficiently prejudicial to warrant relief by habeas corpus; and (5) the trial of the uncharged and unproven offense relating to the purchase of the K-38 revolver

was permissible since the jury was instructed such evidence could only be considered on the issue of "intent". (Appendix E) It is from this decision that this Petition for a Writ of Certiorari is taken.

REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI

A. The Extent to Which the Due Process Limitation on the Right of a State Court of Last Resort to Redefine the Elements of a Criminal Offense So as to Criminalize Conduct Which Was Not Criminal Under State Law When It Occurred, Is Affected by the Defendant's Subjective Belief in the Criminality of His Conduct Should Be Settled by This Court

The United States Constitution, Article I, Section 10, specifically and unequivocally prohibits the States from passing an *ex post facto* law. In *Frank v. Mangum*, 237 U.S. 390, 35 S.Ct. 582, 59 L.Ed. 969 (1915), this Court held that the Ex Post Facto Clause applied only to legislative, and not to judicial, action. Almost a half century later, this Court, in *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), extended the prohibitions of the Ex Post Facto Clause to judicial action through the Due Process Clause, where the judicial action in fact had an *ex post facto* effect.

Two closely-related, but nonetheless different, jurisprudential principles were involved in this Court's extension of the prohibition of the Ex Post Facto Clause to state judicial action via the Due Process Clause. The first, based on the requirement of prior definition of criminality, arises from the *ex post facto* prohibition itself. In footnote 4 to its Opinion in *Bouie,* this Court pointed out: [378 U.S. at p. 352]

> "Thus, it has been said that 'No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority *before the imputed offense was committed, and which existed as a law at the time.* Kring v. Missouri, 107 U.S. 221, 235, 2 S.Ct. 443, 455, 27 L.Ed. 506. See Fletcher v. Peck, 6 Cranch 87,

138, 3 L.Ed. 162; Cummings v. Missouri, 4 Wall 277, 325-326, 18 L.Ed. 356.' (Emphasis added)

In the text of its opinion in *Bouie*, this Court stated: [378 U.S. at pp. 353-354]

> "... Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. An *ex post facto* law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action,' or 'that *aggravates* a *crime*, or makes it *greater* than it was, when committed.' Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed 648. If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Cf. Smith v. Cahoon, 283 U.S. 553, 565, 51 S.Ct. 582, 586, 75 L.Ed. 1264. The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' Hall, General Principles of Criminal Law (2d ed. 1960), at 58-59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue', it must not be given retroactive effect. Id., at 61." (Emphasis by Court)

See also N.R.S. 193.050(1)

The second fundamental principle protected by the Due Process Clause which was involved in the *Bouie* decision was the principle that the law which defines the criminal offense must be sufficiently clear and definite to enable men of common understanding to be given fair notice as to what conduct will be subject to punishment. In *Bouie*, the South Carolina statute in question was narrow and precise, and punished as trespass the act of entering private property after notice that entry was prohibited. In a case intervening between the commission of the charged conduct in *Bouie*, and the state court appeal in *Bouie*, the South

Carolina Supreme Court interpreted the statute, by applying common law rules of civil trespass, to include the act of refusing to leave after request. (*City of Charleston v. Mitchell*, 239 S.C. 376, 123 S.E.2d 512, reversed, 378 U.S. 551, 84 S.Ct. 1901) The convictions were upheld by reference to the *Mitchell* decision. In applying both of the foregoing principles, this Court held that since the South Carolina construction of the statute in *Mitchell* was unforeseeable and unanticipated at the time of the conduct in *Bouie*, the statute did not give fair warning that refusing to leave after request was within the conduct proscribed, and that therefore the judicial modification, when applied to *Bouie*, had an impermissible *ex post facto* effect in violation of the Due Process Clause.

In a later decision, *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) the Court held that the application of judicially modified guidelines to determine obscenity to conduct which occurred before such guidelines were adopted was precluded by the Due Process Clause because the *ex post facto* effect of such application deprived the defendants of fair notice, at the time the conduct occurred, that such new standards would be applied determine what conduct was proscribed by the statute.

Because this Court's decisions regarding the Due Process limitations on the *ex post facto* effect of judicial pronouncements have been focused upon the "fair notice of criminality" principle, the state courts and lower federal courts, in considering the constitutionality of retroactive application of judicial decisions modifying the definition of criminal offenses, have likewise focused upon such "fair notice" principle without considering the correlative principle that the law must define the conduct as criminal at the time it occurs. In many instances, such as those presented in *Bouie* and *Marks*, one principle is subsumed within the other, when the issue is whether it could be fairly said that the law was in place at the time the conduct occurred. Statutory language which arguably includes the conduct, which is merely clarified by the judicial pronouncement does not criminalize conduct occurring before such clarification if the clarification including such conduct is foreseeable and the defendant has fair

notice of such anticipated construction of the statute which will render his conduct criminal. (*See Chavez v. Dickson,* 280 F.2d 727 (9th Cir. 1960).

This focus on "fair notice" or "fair warning" derived from the foreseeability of the judicial action has, however, caused the lower courts in this instance, as well as other courts, to refuse to consider the other principle protected by the Due Process Clause,—that the law criminalizing such conduct and punishing it must in fact be in place and in effect when the conduct occurs. Where the Court definitively interprets a statute to include conduct which foreseeably was included therein, the law is in place, and fair warning or notice is the issue. But where the Court creates a new offense, or changes existing law so as to criminalize conduct which was innocent when it occurred, an entirely different situation is presented. Fair warning is not then the issue. The issue is whether the conduct could have been punished under the law as it existed when the conduct occurred.

If the Nevada Legislature, on October 9, 1974, were debating the adoption of the Model Penal Code definition of "attempt", to make the subjective belief of the actor in the criminality of his conduct the test of such criminality, and adopted the Model Penal Code provision defining the crime in such terms in December of 1976, no one would seriously contend that such new definition of attempt could be applied to the defendant's conduct which occurred in October of 1974, even if the ultimate adoption of such new definition by the Nevada Legislature was clearly foreseeable and expected on October 9, 1974.

The dilution of the prohibition against *ex post facto* criminalization of conduct innocent when it occurred by focusing on "fair notice" or "fair warning" is nowhere more clear than in the case at bar itself, where each Court which has considered the issue has acknowledged, directly or indirectly, that there either was no existing law in Nevada on October 9, 1974, criminalizing an attempt to possess non-stolen property which was believed to be stolen, or that the law specifically excluded such conduct from criminality. The Nevada Supreme Court held that overruling *State v. Lung, supra,* was not a change in the law because the rule thereon was *obiter dicta,* and therefore there was no existing law

to change, and the Court merely created new law by its decision. New law, however, cannot constitutionally criminalize conduct which occurred before its adoption.

The Magistrate on the other hand held that there was an *ex post facto* change, but that it was permissible because the change was foreseeable and predictable in view of modern developments in the law of attempt.

The United States District Judge disagreed with the Magistrate as to the foreseeability of the change, but held that it was there was no definitive law on the issue, noting that the law of Nevada was unclear and uncertain since it was based on the common law which itself was unclear and uncertain.

The United States Court of Appeals held that even if there was a change, it was constitutionally permissible since the defendant believed his conduct to be criminal and therefore was not misled, and his defense was not prejudiced because he was given notice by the ruling on the pre-trial writ of habeas corpus that the new (Model Penal Code) definition would be applied.

In each of the foregoing instances, within this case alone, the concept of "fair warning" and "foreseeability" was utilized to justify and excuse the *ex post facto* criminalization of previously non-criminal conduct; the concept of "fair warning" was not used to determine whether the conduct was criminal when it occurred.

Although this Court specifically stated in footnote 5 of the decision in *Bouie*, [378 U.S. 355] that the defendant's subjective belief in the criminality of the conduct is irrelevant, since the criminality must be measured by an objective analysis of the statute and other pertinent law, it did not decide the issue of whether the Due Process Clause prohibits judicial criminalization of conduct innocent when it occurred only when there is no fair warning that such *ex post facto* criminalization may occur. The concept of "fair warning" is fair warning that the conduct *is* criminal, not "fair warning" that it *may become* criminal. A foreseeable construction which includes conduct arguably within that proscribed is "fair warning" that such conduct *is* criminal; a foreseeable construction which changes the elements of the offense to include conduct which was previously excluded is not

"fair warning", even if the defendant mistakenly believed such conduct was included. This distinction is fundamental, as this Court observed in *Bouie v. City of Columbia,* supra, wherein it stated: [378 U.S. at p. 362]

> "In the last analysis the case is controlled, we think, by the principle which Chief Justice Marshall stated for the Court in United States v. Wiltberger, 5 Wheat. 76, 96, 5 L.Ed. 37:
>
> > "The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. * * * '
>
> "The crime for which these petitioners stand convicted was 'not enumerated in the statute' at the time of their conduct. It follows that they have been deprived of liberty and property without due process of law in contravention of the Fourteenth Amendment."

The lower courts in this case, and in others (*Cf. United States v. Rundle,* (D.C. Pa. 1966) 255 F.Supp. 936, 946-947, have utilized the focus of this Court's decision in *Bouie* upon "fair warning" and "unforeseeable construction" to determine whether an *ex post facto* criminalization of prior innocent conduct is permissible, rather than to determine whether the change in fact criminalized previously innocent conduct. In *Bouie,* the concepts of "unforeseeable construction" and "fair warning" were utilized to analyze whether the conduct was criminal when it occurred. The Court held that since the construction was unforeseeable and there was no fair warning the conduct was included within the statute, the effect was to criminalize prior innocent conduct, which the Due Process Clause could not countenance. In other words, the concept of "fair warning" was utilized to determine

whether the criminalization of the conduct was *ex post facto,* not to determine that a clear *ex post facto* criminalization of prior innocent conduct was permissible. That analysis is a far cry from the analysis of the lower courts in the case at bar, which state that even if there was an *ex post facto* criminalization, the foreseeability thereof gave sufficient fair warning to avoid a Due Process violation, since the defendant was not subjectively misled.

The Nevada statutes in effect on October 9, 1974, criminalized "an act . . . tending . . ." to the accomplishment of a crime with the intent to commit such crime. The essence of the criminality of an attempt was the "act". The common law, incorporated into such definition, (N.R.S. 1.030 and N.R.S. 193.050) provided that if the act did not tend toward the commission of the offense, because of facts rendering such commission legally (as opposed to factually) impossible, such act was not criminal, irrespective of the criminality of the intent. The possession of goods believed to be, but not in fact, stolen, was not a crime at common law. (*Booth v. State,* 398 P.2d 863 (Okl.Cr. 1964; *People v. Jaffe,* 78 N.E. 169 (N.Y. 1906)) The decision in on Petitioner's direct appeal effected a change in that law by the adoption of the Model Penal Code definition of "attempt" which focuses the essence of the criminality on the intent and the subjective belief of the actor as to the effect of his act, a definition intended to be adopted prospectively by legislatures, and clearly intended to expand the criminality of the crime of "attempt" beyond its common law definition. (Comments, Model Penal Code, Tent. Draft 1960, § 5.01, pp. 25-27) Such judicial adoption of new elements to the offense clearly widened the net of criminality to include conduct not previously within the statute's proscriptions, including the conduct of Petitioner herein. Significantly, after such judicial modification of the elements in Petitioner's appeal in 1976, the Nevada Legislature amended the attempt statute in 1981 as to other provisions thereof not involved herein, but retained the original common law definition focusing on the criminality of the act as being one which itself "tended" to the commission of the crime, without reference to the subjective belief of the actor. (N.R.S. 193.330)

It is therefore respectfully submitted that the Petition for a Writ of Certiorari should be granted to clarify that when a state judicial pronouncement in fact criminalizes conduct which was innocent when committed, the retroactive application of such criminalization to the conduct involved in such case violates Due Process regardless of whether such change in the law was foreseeable or the defendant believed his conduct to be criminal at the time it was commited.

B. Certiorari Should Be Granted Because the Decision of the United States Court of Appeals Is Directly Contrary to a Controlling Decision of This Court

In the case at bar, the Defendant was charged with attempted possession of stolen goods. The Indictment charged that the property was stolen, that the defendant knew it was stolen, and intended to keep the property from the true owner. As the Nevada law existed on the date of the offense, the elements of the offense were the specific intent to commit the offense of possession of stolen property, and an act tending towards its commission, which necessitated that the property be stolen, that the actor know or believe it to be stolen, and the requisite criminal intent. After the adoption of the new elements in the opinion on Petitioner's direct appeal, the elements were the specific intent to commit the offense of possessing stolen property, coupled with a subjective belief that the property was stolen and an act which would have tended to the commission of such offense if such subjective belief were true.

Because the trial court had ruled in pre-trial proceedings that the latter definition of the offense would be applied, the defendant submitted written requests for jury instructions in accordance with such elements, i.e., specific intent and his subjective belief in the criminality of his conduct, which were refused. The defendant also requested instructions on the necessity to prove the facts alleged under the indictment, i.e. that the property was stolen, than the defendant knew or believed such property to be stolen, and the specific intend to permanently deprive the owner thereof. The trial court denied such requests, and instead gave the instruction, quoted above, to which defendant objected, which advised the jury that property recovered by the police was no longer

stolen, and only an attempt could be charged, and then telling the jury that unless they found such "facts" beyond a reasonable doubt, they must acquit. The jury was not otherwise told of any "elements" of the offense subject to proof beyond a reasonable doubt.

Although this Court has repeatedly and unequivocally held that the trial jury must be instructed as to each and every element of the charged offense, and that the same must proven by the prosecution beyond a reasonable doubt (*Francis v. Franklin*, 471 U.S. 307, 85 L.Ed.2d 344, 105 S.Ct. 1965 (1985); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)), the lower courts herein have held that the failure to instruct on the elements of the offense does not rise to a due process violation, where the elements as to which there was a failure to instruct, were not "in dispute".

It is submitted that this holding on the part of the lower courts is directly contrary to specific holdings of this Court, which requires instructions on the elements of the charged offense regardless of whether such elements are in dispute. In *United Brotherhood of Carpenters and Joiners of America v. United States*, 330 U.S. 395, 408, 409, 67 S.Ct. 775 (1947), this Court stated:

> "... No matter how strong the evidence may be of an association's or organization's participation through its agents in the conspiracy, there must be a charge to the jury setting out correctly the limited liability under § 6 of such association or organization for acts of its agents. For a judge may not direct a verdict of guilty no matter how conclusive the evidence. There is no way of knowing here whether the jury's verdict was based on facts within the condemned instruction, note 19 above, or on actual authorization or ratification of such acts, note 18. A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction. We are of the opinion that the judge should have instructed the jury as to the limitations upon the liability for the acts of its agents under § 6. The error was aggravated by the failure to give the correct charge upon request."

The charge to the jury entitled them to find the defendant guilty if they determined beyond a reasonable doubt that he was a bad officer, and that is exactly what the prosecution argued. The elements of the offense as charged in the indictment were not within the instructions, nor were the elements of the offense as ultimately re-defined on Petitioner's appeal, although instructions on such elements were requested. The issue of Defendant's subjective belief in the criminality of his conduct was in substantial dispute, but no instruction was given on that issue except the instruction that an officer acting in the course of his duty in taking stolen property into custody for its owner was not committing a crime, which instruction appeared, when taken together with the other instructions, to place the burden of proof on that issue on the defendant. In *Dunn v. United States,* 442 U.S. 100, 60 L.Ed.2d 743, 99 S.Ct. 2190 (1979), this Court held that it is a violation of basic and fundamental principles of Due Process of Law to permit a person to be convicted of a charge not made or a charge not tried. It is submitted that certiorari should be granted in this case to review the holding of the United States Courts of Appeals for the Ninth Circuit that the failure to instruct the jury as to the required elements of the offense is not a violation of Due Process of Law so long as such elements are not disputed, since such holding effectively negatives the presumption of innocence and the burden of proof which protects it, when the jury is permitted to convict without being required to apply the burden of proof to any element of the charged offense. It is submitted that a criminal trial cannot be considered "fair" when the jury is given nothing to decide but whether they believe the defendant is generically a bad person deserving of punishment for being.

C. Certiorari Should Be Granted to Determine Whether the Due Process Clause Permits the Burden of Proof in a Criminal Case to Be Defined in Terms of a "Substantial Doubt"

In *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), this Court decided that the presumption of innocence was constitutionally protected by the Due Process Clause, and that the requirement of proof beyond a reasonable doubt to convict was constitutionally mandated to protect such presump-

tion. Ever since that time, the lower courts have held that defining the burden of proof, "beyond a reasonable doubt", in terms of "substantial" doubt is disfavored as a dilution of the constitutionally-mandated burden of proof, but no Court has held that it arises to a Due Process violation sufficient to warrant relief on habeas corpus. See *Smith v. Bordenkircher,* 718 F.2d 1273 (4th Cir. 1983); *United States v. Muckenstrum,* 515 F.2d 568 (5th Cir. 1975). This Court disapproved the definition of "reasonable doubt" in terms of "substantial doubt" in *Taylor v. Kennedy,* 436 U.S. 478, 56 L.Ed.2d 468, 98 S.Ct. 1930 (1978), but reversed on other grounds, and has never definitively decided whether such definition is a violation of Due Process.

In the case at bar, the United States Court of Appeals for the Ninth Circuit held that the error was not one of constitutional dimension. However, in this case, the instruction is mandated by Nevada law. N.R.S. 175.211(1) defines reasonable doubt in terms of substantial doubt, and N.R.S. 175.211(2) prohibits the giving of any other definition. Thus the Nevada state courts must give the instruction unless the Due Process Clause prohibits it, rendering the statute unconstitutional. It is submitted that this issue should be squarely decided for the guidance of the Nevada state courts as well as the courts of any other State which has similar legislation defining "reasonable doubt".

D. Other Errors of Constitutional Dimension Should Be Corrected on Review by a Writ of Certiorari

The remaining issues raised by this Petition present errors of constitutional dimension in terms of the violation of Defendant's Sixth Amendment right to the effective assistance of counsel by the conduct of the District Attorney in preventing pre-trial investigation by the defense, and in terms of the Defendant's right to be advised of the charges he is called upon to defend and his Fifth Amendment right to a fair trial, which Defendant contends were violated by the conducting of a "mini-trial" of uncharged and unproven conduct alleged to be criminal within the trial of the main case, for the purpose of proving "intent" as to the conduct charged in the main case. These issues arise on facts which are essentially unique to this case, but are issues as to which this Court has not previously issued definitive rulings.

The right to counsel is the right to the effective assistance of counsel. When counsel is unable to investigate and prepare for trial, he cannot be "effective" within the adversary process. In this case, most of the critical witnesses were law enforcement officers. The critical issue was the sequence of events within the police station, for if the Defendant took the firearms directly from Latour to Detective Westlake, without having been first tipped off as to something being wrong with the transaction, such conduct would indicate an innocent intent. If, however, he intended to keep the guns and only turned them in and reported the incident because he was tipped off by Latour's call, an inference of guilty intent would be justified. However, no one but defendant knew all the facts regarding his activities inside the station. People in the Detective Bureau knew he was there and turned in the guns; people in the Patrol Office knew he was there when the Latour call came through, but no one knew where he went first. However, as the testimony developed, it became clear that certain events and conversations gave rise to transmissions in and out of Dispatch. On the eve of trial, the existence of a digitally-timed computer tape recording of all transmissions in and out of Dispatch, in the exclusive possession of the prosecution, was disclosed. During trial, defense counsel was able, on the basis of the testimony of certain witnesses, to locate the recorded transmissions on the Dispatch tape, and ascertain the time of such transmissions in order to juxtapose them with other testimony to determine sequence. Ultimately on reviewing the cold record, it was clear that the Petitioner's version was correct; he reported the incident to detective Westlake and turned in the guns *before* the alleged tip-off phone call from Latour. The inability to investigate the officers' testimony and construct this sequence prior to trial was clearly prejudicial, and such inability was directly due to the prosecution's interference with the right to interview witnesses. Defendant submits this interference violated the Defendant's right to the effective assistance of counsel.

Similarly, the Defendant had no opportunity to conduct a pretrial investigation of the K-38 charges to prepare for trial thereof. Such charges had been severed for separate trial. Yet a large part of the trial on the case involving the three firearms was devoted to the testimony of witnesses called solely to testify to the K-38

incident which occurred the year before. This was not mere reference to prior alleged criminal conduct; this was a full trial, without any of the protections normally guaranteed by Due Process for such a trial. No jury instructions were directed to the proof of the K-38 charge; no presumption of innocence on such charge was extended; the jury was told that such evidence could only be considered on the issue of intent. The triable issue on the K-38 incident, however, was not intent; the issue was whether the defendant knew or had reason to believe the K-38 revolver was stolen when he purchased it. His knowledge of it being stolen was the catalyst to place a gloss of criminality upon his dealing with Latour, as the Magistrate recognized. It was a violation of the Defendant's right to a fair trial and notice of the charge he was called on to defend to force him to defend the charge he knew the K-38 revolver to be stolen as a part of his defense to the charges involving the three firearms he claimed to have possessed, believing them to be stolen, in the course of his duty as an officer.

It is respectfully submitted that this Court should issue its Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit to determine the issues presented herein for the guidance of the lower federal courts and state courts faced with these issues of constitutional dimension.

Dated: October 1, 1987

Respectfully submitted,

HAMILTON & LYNCH
DAVID HAMILTON
VIVIAN E. LYNCH

By: DAVID HAMILTON
Counsel of Record
Attorneys for Petitioner
James Joseph Darnell

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 86-2481
DC CV 83-0072 ECR

James Joseph Darnell,
Petitioner-Appellant,

vs.

Vincent Swinney;
Attorney General of the State of Nevada,
Respondents-Appellee.

[Filed Sept. 1, 1987]

Order on Motion for Stay of Mandate
(Rule 41(b) Fed.R.App.P.)

Upon due consideration of appellant's motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before September 13, 1987.

It is ordered that the motion for stay of mandate be, and the same is hereby Granted.*

/s/ WILLIAM C. CANBY, JR.
United States Circuit Judge
William C. Canby, Jr.

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* In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

In the United States Court of Appeals
For the Ninth Circuit

CA No. 86-2481
DC No. 83-0072

James Joseph Darnell,
Petitioner-Appellant,

vs.

Vincent Swinney;
Attorney General of the State of Nevada,
Respondents-Appellees.

Order
[Filed Sept. 16, 1987]

Upon due consideration of appellant's motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before October 1, 1987.

It is ordered that the motion for stay of mandate be, and the same is hereby Granted.

/s/ WILLIAM C. CANBY, JR.
William C. Canby, Jr.
United States Circuit Judge

Appendix B

Nevada Supreme Court Decision
Direct Appeal—12/21/76

In the Supreme Court of the State of Nevada

No. 8663

James Darnell,
Appellant,

vs.

State of Nevada,
Respondent.

Filed Dec. 21 1976
C.R. Davenport
Clerk to Supreme Court

By /s/ Judith McCulloch
Deputy Clerk

Appeal from judgment and order denying motion for new trial, Second Judicial District Court, Washoe County; Peter I. Breen, Judge.

Affirmed.

David Hamilton, Reno,
for Appellant
Robert List, Attorney
General, Carson City,
Larry Hicks, District
Attorney, Washoe County,
and Kathleen M. Wall, Deputy,
for Respondent

OPINION

Per Curiam:

Convicted by jury verdict of attempted possession of stolen property, appellant contends: (1) a legal impossibility to commis-

sion of the crime precludes conviction; (2) the admission of evidence of prior criminal conduct was improper; and, (3) the evidence was insufficient to support the verdict. We disagree.

Joseph Latour was arrested in Sparks, Nevada, on several charges of burglary. Upon interrogation, Latour admitted the burglaries, led the police to the stolen firearms, and further admitted he had previously sold stolen firearms to appellant, a Reno police officer. Subsequently, while working for the police, Latour sold the recaptured firearms to appellant, who, believing they were stolen, took them to the police station and placed them in a private vehicle rather than in the police evidence locker.

1. Appellant contends that, since the firearms had been recaptured by the police, they were no longer stolen, and thus, it would be legally impossible to commit the crime, it must also be legally impossible to commit the crime of receiving stolen property. Therefore, he argues, since it is legally impossible to commit the crime, it must also be legally impossible to attempt the crime.

While jurisdictions have been in conflict as to whether impossibility bars prosecution for charges of attempt, we believe the better rule is that it does not.[1] The hypothesis of the rule we now adopt is that, even though the actual commission of the substantive crime is impossible because of circumstances unknown to the defendant, he is guilty of an attempt if he has the specific intent to commit the substantive offense, and under the circumstances, as he reasonably sees them, he does the acts necessary to consummate what would be the attempted crime. It is only when the

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[1] Accord: People v. Rojas, 358 P.2d 921 (Cal.1961); State v. Carner, 541 P.2d 947 (Ariz.App. 1975); State v. Korelis, 537 P.2d 136 (Or.App. 1975), aff'd 541 P.2d 468 (Or.1975); N.Y. Penal Law § 110.10 (McKinney 1975); Model Penal Code § 5.01, Comment (Tent. Draft No. 10, 1960): Anno. 85 A.L.R.2d 259 (1962). The Model Penal Code completely eliminates such defenses.

Generally, jurisdictions which previously held otherwise have relied on People v. Jaffe, 78 N.E. 169 (N.Y. 1906), the continued vitality of which has been suspect since the 1965 enactment of N.Y. Penal Law § 110.10 (McKinney 1975), and the decision in People v. Bel Air Equipment Corporation, 360 N.Y.S.2d 465 (App.Div. 1974).

results intended by the actor, if they happened as envisaged by him, would fail to consummate a crime, then and only then, would his actions fail to constitute an attempt. People v. Rojas, 358 P.2d 921 (Cal.1961).

We decline to concern ourselves with the niceties of distinction between physical and legal impossibility; rather, we choose to focus our attention on the question of the specific intent to commit the substantive offense.

An attempt requires only that the appellant have an intent to commit the crime and that he take a direct but ineffectual act toward the commission of the crime. NRS 208.070; Johnson v. Sheriff, 91 Nev. 161, 532 P.2d 1037 (1975). Here, the evidence clearly indicates that appellant intended to and did receive goods he thought were stolen. The fact that the firearms had lost their 'stolen' status was an extrinsic fact unknown to appellant and does not vitiate the criminality of the attempt. See: People v. Rojas, cited above; State v. Vitale, 530 P.2d 394 (Ariz.App. 1975); Lupo v. Superior Court of Los Angeles County, 110 Cal.Rptr. 185 (Cal.App. 1973).

2. Appellant next contends the district court erred by admitting evidence concerning appellant's prior criminal conduct. However, such evidence was offered for the limited purpose of showing appellant's criminal intent and, thus, was relevant and admissible. See: Richardson v. State, 91 Nev. 266, 534 P.2d 913 (1975A); Wallace v. State, 77 Nev. 123, 359 P.2d 749 (1961); cf. State v. Carner, 541 P.2d 947 (Ariz.App. 1975).

3. Finally, appellant contends the evidence adduced at trial was insufficient to support the verdict. We find the verdict supported by substantial evidence, and, thus it will not be disturbed. Mitchell v. State, 92 Nev. , 552 P.2d 1378 (1976).

Other issues raised by appellant are either not supported by relevant authority or without merit and we need not consider them. Jacobs v. State, 91 Nev. 155, 532 P.2d 1034 (1975).

Insofar as this opinion is in conflict with our decision in State v. Charley Lung, 21 Nev. 209, 28 P. 235 (1891), and its progeny, such portion of that case must be and is hereby overruled.

Affirmed.

/s/ Gunderson, C.J.
Gunderson

/s/ Batjer, J.
Batjer

/s/ Zenoff, J.
Zenoff

/s/ Mowbray, J.
Mowbray

/s/ Thompson, J.
Thompson

Attest: A full, true and Correct Copy. C.R. Davenport, Clerk of the Supreme Court

By /s/ Judith McCulloch, Deputy

Appendix C

Nevada Supreme Court Decision
on Post-Conviction Appeal

NO. 12775

In the Supreme Court of the State of Nevada

James J. Darnell,
Appellant,

vs.

The State of Nevada
Respondent.

[Filed Dec. 9, 1982
C.R. Davenport
Clerk of Supreme Court

By /s/ Judith Fountain
Deputy Clerk

Appeal from denial of petition for writ of habeas corpus, or in the alternative, for post-conviction relief. Second Judicial District Court, Washoe County; Peter I. Breen, Judge.

Affirmed.

David Hamilton, Reno,
For Appellant

Richard H. Bryan, Attorney
General, Carson City;
Calvin R. X. Dunlap, Washoe
County District Attorney, and
Edward B. Horn, Deputy, Reno,
for Respondent

OPINION

By the Court, Manoukian, J.:

Darnell appeals from a denial of his petition for writ of habeas corpus, or in the alternative, for post-conviction relief.

Appellant, a Reno police officer, was convicted by jury verdict of attempted possession of stolen firearms, sold to him by a police informant. On direct appeal from that conviction, Darnell contended that it was legally impossible to commit the crime of attempted possession of stolen property, when the guns in question were not, in fact, stolen at the time of the incident, but had been recaptured by police. Darnell vs. State, 92 Nev. 680, 558 P.2d 624 (1976). We rejected that contention, finding that "[a]n attempt requires only that the appellant have an intent to commit the crime and that he take a direct but ineffectual act toward the commission of the crime. NRS 208.070 . . ." *Id.* at 682, 558 P.2d at 625-626. In a petition for rehearing, appellant contended that because the *Darnell* decision overturned the earlier case of State v. Charley Lung, 21 Nev. 209, 28 P. 235 (1891),[1] that decision resulted in *ex post facto* criminality, in violation of his due process guarantees.

Appellant then sought habeas corpus relief in federal court based, in part, on the *ex post facto* considerations. In the federal proceedings, the state claimed that the pertinent language in State v. Charley Lung was merely *obiter dicta*. The state reasoned that because the *Lung* case was without precedential value, our decision in Darnell v. State had no *ex post facto* effect. The United States District Court for Nevada, finding state remedies not exhausted, transferred the federal file to this court, which we accepted as an original application for writ of habeas corpus. We determined that Darnell v. State, *supra*, did not result in *ex post facto* criminality and agreed with the state that the language in State v. Charley Lung relating to legal impossibility was *obiter*

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[1] In State v. Lung, *supra*, the court stated: "[A]n attempt to commit the crime can only be made under circumstances which, had the attempt succeeded, would have constituted the entire substantive offense . . ." 21 Nev. at 213, 28 P. at 236.

dicta. Appellant again sought federal habeas corpus relief, contending, for the first time, that if the passage in State v. Charley Lung was merely dicta, then NRS 1.030 required that the common law be regarded as the law extant prior to Darnell v. State, when appellant's conduct occurred. The common law recognized legal impossibility as a defense to an attempted crime. *See, e.g.* Booth v. State, 398 P.2d 863 (Okla. Cr. 1964). Thus, appellant contended, State v. Darnell still represented a change in the law, and if applied retroactively to him, would constitute an impermissible *ex post facto* ruling. The United States District Court for Nevada and the Ninth Circuit Court of Appeals dismissed appellant's petition, finding that the "common law precedent" argument was a new theory, resulting in a failure to exhaust state remedies. Appellant now asks us to consider his second petition for post-conviction relief, based primarily on the common law precedent argument.

Successive post-conviction applications need not be considered by this court unless the petitioner satisfactorily demonstrates in the latter petition why he failed to raise the issue in the former application. Rogers v. Warden, 86 Nev. 359, 468 P.2d 993, *cert. denied*, 400 U.S. 846 (1970). *See also,* Dromiack v. Warden, 96 Nev. 269, 607 P.2d 1145 (1980). Appellant offers no satisfactory reason for failing to raise the common law precedent theory in the first habeas corpus petition brought before us in 1977. At that time, the state had already made its argument in federal court that State v. Charley Lung was of no precedential value, yet appellant made no attempt to file briefs with this court or request oral argument to support his petition. As we stated in Rogers v. Warden, "[c]riminal appeals must be given finality." *Id.* at 362, 468 P.2d at 994. The litigation which has ensued since Darnell's conviction reflects a piecemeal approach to resolving the *ex post facto* issue; precisely the ill Rogers v. Warden sought to eliminate. Therefore, we decline to entertain appellant's latest argument in support of post-conviction relief.

We have also examined appellant's remaining arguments and find them to be without merit.

We affirm the decision of the trial court.

/s/ MANOUKIAN, J.

We concur:

/s/ STEFFEN
Steffen

/s/ MOWBRAY
Mowbray

SPRINGER, J., with whom GUNDERSON, C.J., Concurs, Dissenting:

In my opinion substantial constitutional questions are presented in this appeal. These issues should be decided and not dismissed on the stated procedural grounds; therefore I dissent.

/s/ SPRINGER, J.
Springer

I concur:

/s/ GUNDERSON, C.J.
Gunderson

Attest: A full, true and Correct Copy. C.R. Davenport, Clerk of the Supreme Court

By /s/ Judith Fountain,
Deputy

Appendix D

United States District Court
District of Nevada

CV-R-83-72-ECR

James J. Darnell,
Petitioner,

vs.

Vincent Swinney, et al.,
Respondents.

MEMORANDUM DECISION AND ORDER
[Filed May 6, 1986]

James J. Darnell petitions this Court for a writ of habeas corpus under 28 U.S.C. § 2254. The Magistrate recommended denial of the petition and Darnell timely filed objections to her report and recommendation.

Darnell, who was convicted in 1975 of attempted possession of stolen property, has twice before been in federal district court, to the Ninth Circuit and before the Nevada Supreme Court three times on the issues before this Court.[1] The transcripts and court

[1] In October, 1975, a jury convicted Darnell of the felony offense of attempting to possess stolen property. The Nevada Supreme Court affirmed the judgment of conviction and sentence on direct appeal. *Darnell v. Nevada*, 92 Nev. 680, 559 P.2d 624 (1976). In February, 1977, Darnell filed a petition for writ of habeas corpus in the United States District Court for the District of Nevada. On report and recommendation, the United States Magistrate recommended granting Darnell's petition. On review, the Hon. Bruce R. Thompson noted that all of Darnell's claims had not been exhausted and ordered the action be transferred to the Nevada Supreme Court with a request that the file be docketed there as an original petition for habeas corpus. *Darnell v. Galli*, No. 77-019-BRT (D.Nev. Aug 22, 1977). The Nevada Supreme Court accepted the file and denied the petition for writ of habeas corpus. *Darnell v. Sheriff*, No. 10059 (Nev. Sept. 14, 1977). The file was

files in this case are understandably voluminous. The petition finally, however, stands properly submitted to this Court for decision. The Court has made a *de novo* review of the entire record and for the reasons stated below, this Court accepts in part and rejects in part the report made by the Magistrate. *See* 28 U.S.C. § 636(b)(1). The Court does, however, agree with the recommendation that the petition should be denied.

FACTS

James Darnell, a Reno Police Officer, was convicted of attempted possession of stolen firearms, sold to him by Joseph Latour, a police informant. Latour, after being arrested in Sparks, Nevada, on several charges of burglary, admitted under interrogation that he had previously sold stolen firearms to Darnell. Based upon this information in the Reno and Sparks police departments and the Washoe County District Attorney's Office began an investigation of Darnell.

The police arranged for Latour to offer to sell Darnell three guns which had recently been recovered. The police wired Latour for sound and gave the three recovered guns to Latour. Latour then drove to a restaurant. Upon phoning the Reno Police dispatcher, Latour was told that Darnell was on a food break. Latour then contacted Darnell and advised him that he had something to sell. Darnell agreed to meet Latour in fifteen or twenty minutes.

Darnell met Latour at a restaurant and then they both proceeded to Darnell's patrol car. Latour advised Darnell that the guns were stolen and laid them on the hood of the patrol car. They agreed Darnell would pay $100.00 for the three guns, which

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transferred back to the federal court. Darnell raised a new issue and the district court found that the claims had not been exhausted. *Darnell v. Galli,* No. 77-019-BRT (D.Nev. March 6, 1978). The Ninth Circuit affirmed. *Darnell v. Galli,* No. 78-1955 (9th Cir. 1979). Darnell then returned to the state and sought post conviction relief in the Second Judicial District Court which denied Darnell's petition. *Darnell v. Nevada,* No. 299428 (July 29, 1980). The Nevada Supreme Court affirmed the denial on procedural grounds without reviewing the claims on the merits. *Darnell v. Nevada,* 98 Nev. 518, 654 P.2d 1009 (1982).

Darnell would pay the next day. Darnell apparently threatened to kill Latour if Latour ever told any law enforcement officers about the sale. Darnell suggested to Latour that if anyone ever asked him about the guns that he should say that somebody driving a pickup truck bought them on the way out of town.

Darnell took possession of the guns and headed back to the Reno Police Station. While on his way, Darnell radioed the dispatcher and asked whether his commander was in the station. Although told that his commander was in, Darnell did not ask to so speak to him, nor did he make any reference to the just completed transaction with Latour.

Police officers monitored Darnell's arrival to the police station. Darnell first double-parked next to Officer Hazen's car, who was to give Darnell a ride home that night. When another car pulled up behind him, Darnell drove to the gate of the parking area. He removed the guns and took them back to Hazen's car where he put them on the floor and locked the car. He then drove his patrol car to the general servicing area of the police station, parked the patrol, car and entered the police station.

Once inside the police station, Darnell requested some leave forms. He apparently filled these out. He then talked with some fellow officers and then a series of conversations took place. At some point, Darnell returned to Hazen's car and removed the three guns. He then took them to the office of Detective James Westlake. Darnell also took a phone call from Latour. The respondents argued, and the state habeas court found that the phone call Latour made to the police station tipped Darnell off to the set-up and that prompted him to turn in the guns as recovered stolen property. Shortly thereafter, the police arrested Darnell.

ANALYSIS

Darnell presents six issues in support of his petition: (1) that his conviction represents ex post facto criminalization of conduct that was legally innocent under common law precedent and statute; (2) that the trial judge failed to properly instruct the jury on the critical elements of the charged offense; (3) that there was insufficient evidence in the record to support the verdict; (4) that

the reasonable doubt instruction unconstitutionally diluted the prosecution's burden of proof; (5) that the trial judge improperly admitted evidence of Darnell's prior criminal charges; and (6) that the prosecution prevented Darnell from preparing an adequate defense in advance of trial, thereby denying him effective assistance of counsel. As noted, the Magistrate reported that none of these claims support habeas relief. Darnell objects to the Magistrate's report and recommendation.

Darnell requests oral argument, but does not request an evidentiary hearing on this matter. This Court has examined the record to determine if circumstances exist to warrant an evidentiary hearing. The Supreme Court has identified six circumstances in which a federal habeas petitioner has a right to an evidentiary hearing. *Townsend v. Sain*, 372 U.S. 293, 313 (1963). They are: (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not supported by the record as a whole; (3) the fact-finding procedure employed by the state was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. *Id.* The record which has been provided to this Court demonstrates that an evidentiary hearing is not warranted in this case.

As a preliminary note, the Court notes that throughout their answer, respondents argued that the "law of the case" had been established by Judge Thompson's previous order on Darnell's first petition for habeas corpus in federal court. This argument is wholly without merit. Judge Thompson specifically found that the petition presented unexhausted issues and the Ninth Circuit affirmed. Respondents' attempt to foreclose Darnell's right to have the issues presented reviewed by a federal district court is viewed with disfavor.

WHETHER OR NOT DARNELL'S CONVICTION REPRESENTED EX POST FACTO CRIMINALIZATION OF CONDUCT

Darnell's first claim for relief presents two legal rationales. Darnell's first contention relies on the Nevada case of *State v. Lung,* 21 Nev. 209, 28 P. 235 (1891). Specifically relying on *Lung,* Darnell contends that an attempt to commit a crime can only be made under circumstances which, had the attempt succeeded, would have constituted the substantive offense. The Nevada Supreme Court held that the language in *Lung* relating to legal impossibility was *obiter dicta* and, thus, its judicial decision in Darnell's appeal was not retroactively applied. *Darnell v. Sheriff,* No. 10059 (Nev. Sept. 14, 1977). Because of this ruling, Darnell then argued that the common law precedent, which Nevada incorporates pursuant to NRS § 1.020, recognized legal impossibility as a defense to an attempted crime. This, Darnell contends, meant that at the time of his actions, it was legally impossible for him to have committed the attempted possession of stolen property because he could not have committed the offense of possessing stolen property.

The Magistrate, in finding that Darnell's conduct was illegal at the time he committed the acts and thus reasoning that his constitutional rights had not been violated, examined the issue under Nevada law. This Court must also, however, examine Darnell's claim that because Nevada incorporates by statute all common law precedent, and because common law precedent (irrespective of any past decisions of Nevada) would have found that his conduct was not criminal, then his conviction represented a "common law precedent" ex post facto conviction. Because the Magistrate did not analyze the second tier of Darnell's argument, this Court will examine anew all of Darnell's claims on this issue.[2]

Darnell first argues that the Nevada Supreme Court, in *State v. Lung* was a recognition that unless all of the elements of the

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[2] Despite the numerous times that Darnell has been before the various courts, the merits of Darnell's common law ex post facto precedent argument has only been addressed by the Second Judicial District Court.

attempted crime could be proven no attempt to commit the crime could legally occur. The absence of one of those elements, in this case the element of stolen property, would make the attempt of committing the crime legally impossible. Darnell relies on the following statement to support his claim:

> "[A]n attempt to commit a crime can only be made under circumstances which, had the attempt succeeded, would have constituted the entire substantive offense. . . ."

21 Nev. at 213, 28 P. at 236.

There is no dispute that in the direct appeal of Darnell's case, the Nevada Supreme Court held that "[a]n attempt requires only that the appellant have an intent to commit the crime and that he take a direct but ineffectual act toward the commission of the crime." *Darnell v. Nevada,* 92 Nev. 680, 682, 558 P.2d 624, 625-626 (1976). The Supreme Court specifically rejected that body of law which would have made his conduct legally impossible to commit the crime or of attempted possession of stolen property when the guns were not in fact stolen at the time of the incident. *Id.* at 682, 558 P.2d at 625.

The Nevada Supreme Court, however, held in its order denying his first state petition for habeas corpus that the language which Darnell relies upon was merely *obiter dicta. Darnell v. Sheriff,* No. 10059 (Nev. Sept. 14, 1977). Thus, the court found no violation of Darnell's due process rights because of an ex post facto judicial application. The interpretation of the Nevada court with respect to the meaning of its previous decision is binding on this Court. *See Wainwright v. Goode,* 464 U.S. 78, 84 (1983) (per curiam). Habeas relief is unavailable for the interpretation or application of state law. *Engle v. Isaac,* 456 U.S. 107, 119 (1982). Accordingly, the issue presented to this Court is whether or not the common law established a precedent which prior to the 1976 *Darnell* decision meant that Darnell's conduct was legally impossible and, thus, the conviction violated his constitutional rights.

Darnell's argument rests on the presumption that the common law conclusively recognized that legal impossibility constituted a defense to conduct such as Darnell's. This, however, is not the

case. Common law was divergent on this issue. While there are some common law cases which would have found Darnell could not have attempted to possess stolen property, there are other common law cases which would have found that he could. *See e.g. Ex Parte Magidson,* 32 Cal.App. 566, 163 P. 689 (1917) (even though tires were not stolen when the defendant received them, nevertheless he did attempt to receive stolen property); *People v. Rojas,* 55 Cal. 2d 252, 10 Cal.Rptr. 465, 358 P.2d 921 (1961); *see also People v. Jaffe,* 185 NY 497, 78 NE 1113 (1906) (the purchase of cloth which had been discovered stolen prior to the sale to defendant could not constitute stolen property for the purposes of attempting to possess stolen property). Accordingly, Darnell's argument fails to support habeas relief.

WHETHER THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY ON THE ESSENTIAL ELEMENTS OF THE OFFENSE

Darnell next argues that the Magistrate incorrectly found that the trial court, while not providing model instructions, did not violate his constitutional rights. After conducting a *de novo* review, we reject Darnell's objections and adopt the Magistrate's report and recommendation.

WHETHER THERE WAS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT DARNELL'S CONVICTION

Darnell argues that there was insufficient evidence to support his conviction. He asserts that a careful review of the events commencing with his return to the police station clearly reveals that he never intended to keep the guns, but rather intended to turn them in as recovered property. Darnell argues that because he can conclusively demonstrate that the tip-off call from Latour did not occur before he turned the guns in, then he obviously did not intend to possess them. Darnell incorrectly assumes that fact was the only evidence against him. As the Magistrate ultimately found, there was other evidence which supported his conviction.

The relevant question for a federal court sitting in habeas review is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). While the Magistrate lost sight of this standard, she did ultimately find sufficient evidence in the record. It is not the function of this Court to determine that every piece of evidence or that every argument is proved beyond a reasonable doubt, as Darnell urges. We should not second-guess the jury to determine what they implicitly did or did not find. Whether or not the testimony could be construed to find that Darnell did or did not receive Latour's tip-off phone call is not a proper question for this Court. *Id.* at n.13. Rather, the prosecution must prove beyond a reasonable doubt "every fact necessary to constitute the crime charged." *Mullaney v. Wilbur,* 421 U.S. 684, 685 (1975).

As the Magistrate ultimately concluded, the case against Darnell does not stand or fall on the "tip-off" call from Latour. It is not a federal court's function to determine exactly what the trier of fact determined, rather to examine all of the evidence and determine if any rational trier of fact could find guilt beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. at 319. This Court conducted a *de novo* review of the entire record and finds that there is sufficient evidence to support Darnell's conviction.

WHETHER THE REASONABLE DOUBT INSTRUCTION UNCONSTITUTIONALLY DILUTED THE PROSECUTION'S BURDEN

Darnell argues that the use of the word "substantial" in defining reasonable doubt was in error. Habeas corpus relief should not be granted unless the erroneous instruction "by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten,* 414 U.S. 141, 147 (1973). Due process requires that in a criminal prosecution the defendant be convicted of no less than guilt beyond a reasonable doubt. *In Re Winship,* 397 U.S. 358, 364 (1970). Thus, this Court must determine whether Darnell was convicted by a lesser standard than guilt beyond a reasonable doubt. The instruction given in the case was:

> A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the

> minds of the jurors, after the entire comparison and consideration of all the evidence, are in such condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual and *substantial,* not mere possibility or speculation. (emphasis added)

Other courts have held that proof of guilt beyond a reasonable doubt requires a greater evidentiary showing by the government than proof of guilt beyond a substantial doubt. Consequently, these courts have not approved of the type of instruction given in this case. However, in judging whether the state has transgressed constitutional bounds, a federal court sitting in habeas exercises a limited role. When it is an alleged erroneous jury instruction, the instruction should be viewed in the context of the overall charge. *Cupp,* 414 U.S. at 147. The question is not merely whether the instruction is undesirable or even universally condemned. *Id.* at 146. As the Fourth Circuit has noted, a "substantial doubt" instruction standing alone has never been the basis for federal habeas corpus relief. *Smith v. Bordenkircher,* 718 F.2d 1273, 1277 (4th Cir. 1983); *see e.g. Payne v. Smith,* 667 F.2d 541 (6th Cir. 1981) *cert. denied* 102 S.Ct. 1983 (1982); *United States v. Rodriguez,* 585 F.2d 1234, 1241 (5th Cir. 1978), *on reh'g en banc,* 612 F.2d 906 (5th Cir. 1980).

The instruction used at Darnell's trial must be examined to determe whether the trial was infected, thereby denying Darnell due process. *See Cupp* 414 U.S. at 147. In this instance the word "substantial" was used only once. "A reasonable doubt" is otherwise explained as "one based on reason" and "a doubt that would govern or control a person in the more weighty affairs of life." Upon reviewing the instruction as a whole, without isolating a single phrase, the Court finds that a proper concept of reasonable doubt was conveyed to the jury. Darnell's due process rights were not violated. Therefore, his contention concerning the jury instruction is insufficient to grant relief.

WHETHER THE ADMISSION OF DARNELL'S ALLEGED PRIOR CRIMINAL CONDUCT VIOLATED HIS DUE PROCESS RIGHTS

Darnell argues that the trial court's admission of the alleged prior incident where Latour sold him a stolen pistol branded him a criminal and forced him to defend another charge. Darnell had been charged in Count III of the Indictment with possession of stolen property, a K-38 pistol, obtained from Latour approximately one year before the events which were the subject of this conviction. Count III was severed from this trial. On the eleventh day of trial, the trial court allowed the prosecution to present evidence of the K-38 incident to show intent. Even if the admission were erroneous under state rules of evidence, the argument is cognizable under a habeas petition only if Darnell's constitutional rights were violated. *Gutierrez v. Griggs,* 695 F.2d 1195, 1197-98 (9th Cir. 1983). Darnell has not shown that the admission of this evidence, even if erroneous, rendered his trial so fundamentally unfair as to violate federal due process. *See Butcher v. Marquez,* 758 F.2d 373, 378 (9th Cir. 1985).

WHETHER THE PROSECUTION'S ALLEGED INTERFERENCE WITH POTENTIAL WITNESSES DENIED DARNELL OF EFFECTIVE ASSISTANCE OF COUNSEL OR OF DUE PROCESS

Darnell argues repeatedly in support of his "right to talk to witnesses." If this were a case before this Court, we would have no problem ruling on this right. However, we sit as a habeas court and as such only examine *constitutional* rights. Therefore, any problems which Darnell's counsel had in interviewing witnesses must be examined in light of his right to effective assistance of counsel and his right to due process.

The Supreme Court has recognized that the "right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson,* 397 U.S. 759, 771, n.14 (1970). The standard to determine effective assistance of counsel was recently enunciated by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). The Court held that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so

undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. *Id.* Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.*

Darnell argues that the memorandum issued by the District Attorney's office urging the police officers "to adopt a strict policy with regard to the release of information concerning pending criminal cases," Joint Appendix at p.64, hampered his counsel's ability to properly investigate and prepare for trial.

Investigation is one of the keys to effective counsel. This is especially true with respect to important witneses. However, counsel need not pursue "every path until it bears fruit and all conceivable hope withers." *United States v. Tucker*, 716 F.2d 576, 584 (9th Cir. 1983) quoting *Lovett v. Florida*, 627 F.2d 706, 708 (5th Cir. 1980). *See also United States v. Parr-Pla*, 549 F.2d 660, 664 (9th Cir.), *cert. denied* 431 U.S. 972 (1977) (Counsel's failure to seek continuance to attempt to locate missing witnessses did not constitute ineffective representation, since the record indicated that at most the witness would have confirmed portions of defendant's testimony relating to a collateral issue.).

The transcript, which the Court carefully reviewed, reveals that counsel was not hampered by any inability to question witnesses. Counsel extensively cross-examined all of the witnesses. The Court does not find counsel's performance either deficient or prejudicial to Darnell's defense as a result of the prosecution's conduct.

Although Darnell did not assert that his right to due process had been violated by the alleged improper instructions from the Washoe County District Attorney's office, the Court conducted a review on this basis. Darnell's basic argument, prior to the Magistrate's Report and Recommendations, was that his inability

to question police officers until trial forced him to recall the officers during his own case for further questioning. He admits that he was able to relate the coded transmissions of the tapes of the police station calls to the testimony and then recall the officers. *See* Petitioner's Points and Authorities Traversing Respondent's Opposition (document #24) at 83. He then asserts that the sequence of events was impossible to ascertain until preparing for the appeal.

As the Court found above, sufficient evidence existed to support Darnell's conviction. Thus, the trial was not rendered fundamentally unfair by the prosecution's interference with witnesses. Regardless of this finding, we reject Darnell's argument that Latour could not have "tipped-off" Darnell.[3]

CONCLUSION

Darnell fails to raise any issues which would support habeas relief.

IT IS, THEREFORE, HEREBY ORDERED that the petition for writ of habeas corpus is DENIED.

IT IS FURTHER ORDERED that effective 10 days from this date, the order of the Court admitting Darnell to bail pending disposition of his petition is VACATED. At that time, the unsecured bond posted by Darnell for his release is EXONERATED.

DATED: May 6th, 1986.

EDWARD C. REED
United States District Judge

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[3] The Court realizes that we are rejecting the Magistrate's report on this issue. *See Report and Recommendation* at 19-27. We conducted a *de novo* review of all of the testimony and compared it to the Magistrate's report. The Court is unpersuaded that no rational trier of fact could have determined beyond a reasonable doubt that Darnell had received Latour's tip-off call.

Appendix E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES JOSEPH DARNELL, *Petitioner-Appellant,* v. VINCENT SWINNEY; ATTORNEY GENERAL OF THE STATE OF NEVADA, *Respondent-Appellee.*	No. 86-2481 D.C. No. CV-R-83-72-ECR OPINION

Argued and Submitted
March 10, 1987—San Francisco, California

Filed July 27, 1987

Before: William C. Canby, Jr. and William A. Norris, Circuit Judges, and Carolyn R. Dimmick,* District Judge.

Opinion by Judge Canby

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, Jr., District Judge, Presiding

SUMMARY

Criminal Procedure

Appeal from denial of petition for writ of habeas corpus. Affirmed.

*Honorable Carolyn R. Dimmick, United States District Judge, Western District of Washington, sitting by designation.

This action arises from appellant Darnell's conviction for attempted possession of stolen firearms. The firearms in question had been recovered by the police and then used by the police in its arrangement to allow an informant to sell the firearms to Darnell. At trial Darnell argued that since the firearms had been received before the attempted sale, it was impossible for him to have attempted to possess stolen firearms. The state supreme court rejected this argument. Darnell now contends, inter alia, that the supreme court's decision resulted in an unforeseeable judicial enlargement of a criminal statute which acted like an ex post facto law.

[1] Due process forbids the imposition of criminal penalties against a defendant who had no fair warning that his conduct violated the law. Darnell clearly had fair warning that his contemplated conduct was criminal. [2] Although the trial court's jury instructions are far from models of clarity, any deficiencies in the instructions went to matters that were not in dispute. [3] Although equations of reasonable doubt with substantial doubt, as was done by the trial court, has been uniformly criticized, it has never been the basis for federal habeas relief. [4] The instruction's one reference to substantial doubt did not so infect the entire trial as to deprive Darnell of due process.

COUNSEL

Vivian E. Lynch, Reno, Nevada, for the petitioner-appellant.

Timothy G. Randolph, Reno, Nevada, for the respondent-appellee.

OPINION

CANBY, Circuit Judge:

James J. Darnell appeals the district court's denial of his petition for a writ of habeas corpus. Darnell, a Reno police

officer, was convicted of attempting to possess stolen firearms. Darnell argues that (1) his conviction represents an *ex post facto* criminalization of conduct that was not criminal when it occurred; (2) the trial court failed to instruct the jury adequately on the elements of the offense; (3) the trial court failed to instruct the jury adequately on the definition of reasonable doubt; (4) the trial court erred in allowing the introduction of evidence of prior criminal conduct; (5) the prosecution improperly interfered with defense access to witnesses prior to trial; and (6) the evidence was not sufficient to establish intent beyond a reasonable doubt.

FACTS

In October, 1974, Joseph Latour was arrested on several charges of burglary. Upon interrogation, Latour confessed that he had burglarized a camper and had taken two shotguns and a .22 caliber pistol. Latour also stated that he had previously sold a stolen K-38 revolver to Darnell. The Reno and Sparks Police Departments then arranged for Latour to offer to sell Darnell the guns recovered from Latour's burglary. They wired Latour for sound.

On October 9, 1974, Darnell met Latour at a restaurant, and the two men proceeded to Darnell's patrol car. Latour told Darnell that the guns were stolen and laid them on the hood of the car. Darnell took the guns, promised to pay Latour the next day, and returned to the Reno Police Station. When Darnell arrived at the station, he placed the guns in a private automobile. Darnell later returned to the automobile, removed the guns, and took them to the office of Detective James Westlake. At some disputed time after Darnell arrived at the station, he received a telephone call from Latour. Shortly after Darnell took the guns to Westlake's office, he was arrested.

STANDARD OF REVIEW

We review *de novo* the district court's denial of a *habeas corpus* petition. *Weygandt v. Ducharme*, 774 F.2d 1491, 1492 (9th Cir. 1985).

DISCUSSION

1. The *ex post facto* claim

Darnell was convicted of attempting to possess stolen firearms in violation of Nev. Rev. Stat. § 208.070.[1] It is undisputed that the firearms had been recovered from Latour and thus were no longer actually stolen property. On original appeal, Darnell argued that under Nevada law it was legally impossible for him to commit the offense of attempting to possess stolen property because he could not have committed the offense of possessing stolen property. *See State v. Lung*, 21 Nev. 209, 28 P. 235 (1891).[2] The Nevada Supreme Court rejected this argument and affirmed Darnell's conviction, holding that "[w]hile jurisdictions have been in conflict as to whether impossibility bars prosecution for charges of attempt, we believe the better rule is that it does not." *Darnell v. State*, 92 Nev. 680, 558 P.2d 624, 625 (1976). The court also stated that "[i]nsofar as this opinion is in conflict with our decision in *State v. Charley Lung* [citation omitted] and its progeny, such portion of that case must be and is hereby overruled." 558 P.2d at 626.

Darnell now argues that his conviction for attempting to possess stolen property was unconstitutional because the state court's construction of Section 208.070 in *State v. Darnell* was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). Darnell relies upon decisions holding that an unforeseeable judicial

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[1]The statute provides in pertinent part that "[a]ny act done with intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime." Nev. Rev. Stat. § 208.070 (1969)(current version at Nev. Rev. Stat. § 193.330 (1986)).

[2]In *State v. Lung*, the Nevada Supreme Court stated that "an attempt to commit a crime can only be made under circumstances which, had the attempt succeeded, would have constituted the entire substantive offense." 28 P. at 236.

enlargement of a criminal statute can act like an *ex post facto* law and thereby violate the Due Process Clause. *See, e.g., Bouie; Marks v. United States*, 430 U.S. 188 (1977); *United States v. Potts*, 528 F.2d 883, 886 (9th Cir. 1975)(en banc); *United States v. Goodheim*, 651 F.2d 1294, 1297-98 (9th Cir. 1981).

[1] We reject Darnell's argument. The principle underlying *Bouie* and the later cases is that due process forbids the imposition of criminal penalties against a defendant who had no fair warning that his conduct violated the law. *Marks*, 430 U.S. at 191-92. "When [an] unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." *Bouie*, 378 U.S. at 354-55. In the present case, however, Darnell clearly had fair warning that his contemplated conduct—attempting to possess stolen property—was criminal. Thus, even if it is assumed that the Nevada Supreme Court's interpretation of Section 208.070 changed Nevada's law of criminal attempt, Darnell has failed to show that this change resulted in any surprise that affected his conduct. Nor has he shown that he was unfairly surprised in a way that affected his legal defense, since he conducted that defense with full notice that Section 280.070 was being construed against him. We therefore hold that Darnell's conviction did not violate his right to due process.

2. The instruction on the elements of the offense

The petitioner in a habeas corpus proceeding has the burden of demonstrating that an erroneous jury instruction "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). In the present case, Darnell argues that the trial judge failed to instruct the jury adequately on the elements of the offense. The crucial instruction follows:

> Nevada Revised Statutes Section 208.070, insofar as applicable to this case provides: That an act done with intent to commit a crime, intending but failing to accomplish it, is an attempt to commit that crime.
>
> Property which had at one time been stolen, but which has been recovered by the police, loses its character as stolen property upon such recovery. Once such property is in the custody of the police, it is no longer stolen property. Since the property involved herein had been recovered, the offense of receiving stolen property could not be completed, and only an attempt could be charged.
>
> Unless you find from your consideration of all of the evidence that each of such facts has been proven beyond a reasonable doubt, the State has not sustained its burden of proof and you must acquit the defendant.

Darnell points out that this instruction fails to list the "facts" that must be "proven beyond a reasonable doubt."

[2] We agree that the trial court's instructions are far from models of clarity. We think, however, that any deficiencies in the instructions went to matters that were not in dispute. It was undisputed at trial that Darnell received the guns from Latour and that Darnell believed the guns to be stolen. The primary issue at trial was whether Darnell received the guns intending to turn them in to the police or whether he purchased them for his own use. On this disputed issue of intent, the jury was not misled by the instructions.[3] We therefore

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[3]Darnell's theory of the case was presented to the jury in a later instruction:

> A police officer who receives custody of stolen property with the intent to perform his statutory duty to preserve it for the true owner thereof is not guilty of a crime.

agree with the district court that any deficiencies in the jury instructions did not so infect the entire trial as to deprive Darnell of due process.

3. The reasonable doubt instruction

[3] Darnell also argues that the trial court's reasonable doubt instruction unconstitutionally diluted the prosecution's burden of proof by stating that a reasonable doubt must be "actual and substantial."[4] We note that the equation of reasonable doubt with substantial doubt has been uniformly criticized, *see, e.g., Taylor v. Kentucky*, 436 U.S. 478, 488 (1978), but that a substantial doubt instruction standing alone has never to our knowledge provided the basis for federal habeas relief. *See Smith v. Bordenkircher*, 718 F.2d 1273, 1277 (4th Cir. 1983), *cert. denied*, 466 U.S. 976 (1984). We also note that "[b]efore a federal court may overturn a conviction resulting from a state trial in which [an erroneous] instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp*, 414 U.S. at 146.

[4] In the present case, the challenged instruction used the word "substantial" only once. Reasonable doubt was otherwise explained as a doubt "based on reason" and "a doubt that would govern or control a person in the more weighty affairs of life." The latter formulation is similar to language

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[4]The instruction reads in its entirety:

> A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual and substantial, not mere possibility or speculation.

we held not to be constitutional error in *Hatheway v. Secretary of the Army*, 641 F.2d 1376, 1378 n. 2, 1384 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981). We reach the same conclusion here. The instruction's one reference to substantial doubt did not so infect the entire trial as to deprive Darnell of due process. *See Cupp*, 414 U.S. at 147.

Darnell's remaining claims are without merit. Darnell has not shown that the admission of evidence of a prior purchase of a stolen weapon rendered his trial so fundamentally unfair as to violate due process. *See Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985). The evidence was relevant to the question of Darnell's intent, and the trial judge instructed the jury that it was to be considered for no other purpose. Nor has he shown that the prosecution improperly interfered with his access to witnesses or that any interference denied him effective assistance of counsel. Finally, we agree with the district court that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

AFFIRMED.